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In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES S. ANDERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee may claim the protection of the Fourth Amendment against a search of an office at his employer's place of business, where the office is not the employee's own work space or similar area.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 154 F.3d 1225. The opinion of the district court (App., *infra*, 25a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1998. A petition for rehearing was denied on December 1, 1998 (App., *infra*, 40a-41a). On February 19, 1999, Justice Breyer extended the time within which to file a petition for a writ of certiorari to

and including March 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondent James S. Anderson was indicted on one count of conspiring to knowingly receive and distribute child pornography via the Internet, in violation of 18 U.S.C. 2252(a)(2)(b), and two counts of knowingly transporting and shipping child pornography, in violation of 18 U.S.C. 2252(a)(1). The district court ordered the suppression of evidence found by the FBI at respondent's place of employment as well as incriminating statements respondent made at that location, and the court of appeals affirmed.

1. This case arises from a successful sting operation conducted by the FBI to identify and prosecute individuals engaged in the interstate trafficking of child pornography. In July of 1996, respondent, a member of an Internet chat room known as the "Orchid Club," agreed to exchange child pornography with another member, Paul Buske. After respondent sent Buske blank videotapes on which to record the child pornography, Buske sent videotapes purporting to contain child pornography to respondent's post office box. On

Saturday, July 6, 1996, respondent retrieved the tapes. App., *infra*, 1a-2a, 26a. Unbeknownst to respondent, Buske—who had been arrested by the FBI on child pornography charges about a month earlier— was assisting the FBI; the tapes in fact were blank; and FBI agents were following respondent when he picked up the tapes. *Ibid.*

Respondent drove, with FBI agents in covert pursuit, to an office building occupied by ATD Corporation, where respondent was Vice President of Research and Development. Using his key card, respondent opened the front door and carried the tapes inside, allowing the door to lock behind him. App., *infra*, 2a, 26a-27a. Shortly thereafter, FBI agents became concerned that respondent might view the tapes, discover that they were blank, and realize that he had been the subject of a sting; he might then attempt to destroy evidence linking him and others to child pornography, the agents feared. *Id.* at 2a; see *id.* at 32a-33a. The agents rang the building's doorbell and knocked on the front door; respondent did not answer. *Id.* at 2a, 27a. They sounded a siren, but respondent (who was not wearing his hearing aids) did not respond to that either. *Ibid.* Concerned that respondent might be destroying evidence—a concern that was heightened by the belief that the building contained an incinerator that could be used to achieve that end—the FBI agents decided to enter the building and detain respondent. *Id.* at 3a, 32a-33a.

The FBI found respondent in a vacant office on the second floor—room 222—attempting to view child pornography. Room 222 had no desk, no telephone, no files, and no name plate on the door. App., *infra*, 8a n.1; *id.* at 23a (Kelly, J., dissenting); Gov't C.A. App. 119

(Tr. 34[1]). It was, in respondent's words, a vacant office that "had no use at all." App., *infra*, 8a n.1; Gov't C.A. App. 120 (Tr. 35). Respondent has not claimed that he had any prior connection to the room; nor does he claim that he had ever used it even on a single occasion before. App., *infra*, 8a n.1; *id.* at 23a (Kelly, J., dissenting). That day, however, respondent had entered the room with the tapes, drawn the curtains, and placed a towel over an interior window. *Id.* at 3a, 27a. Consequently, when FBI agent Joseph Bradley opened the unlocked door to room 222, he found respondent inside, in front of a VCR and television borrowed from another room, attempting to watch the video Buske had sent him. *Ibid.*; see *id.* at 23a (Kelly, J., dissenting); Gov't C.A. App. 120 (Tr. 35).

After respondent was read his *Miranda* warnings, he stated that he understood his rights and that he wished to cooperate; he also signed a written waiver of his rights. App., *infra*, 4a, 28a. Respondent then admitted his involvement in child pornography on the Internet and, after consenting to a search of his own office, told the FBI agents where in that office they would find child pornography. *Ibid.* Pursuant to a warrant that the agents had obtained before respondent picked up the videotape sent by Buske, the FBI then searched respondent's home. That search revealed, among other things, more child pornography. *Ibid.*

2. After a hearing, the district court granted respondent's motion to suppress. App., *infra*, 25a-39a. The court held that the FBI's warrantless entry into the ATD Corporation office building and the vacant office where respondent was found constituted an

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[1] "Tr." refers to the transcript of the hearing conducted by the district court.

unlawful search, and that respondent's consent to the search of his own office and his incriminating statements were fruits of the unlawful search. The court therefore granted respondent's motion to suppress any evidence found when the agents entered room 222 (where respondent was discovered attempting to view child pornography), the incriminating statements respondent made at the time, and all evidence found in and any statements made in respondent's own office as well.

The district court rejected the government's argument that, even if the agents' entry into ATD's building and the vacant office violated respondent's employer's Fourth Amendment rights, it did not violate respondent's rights.[2] Because respondent had taken actions to preserve his privacy, the court concluded that he had a subjective expectation of privacy. App., *infra*, 30a. And, based on the facts that respondent was a corporate officer and had a key to the premises, the court concluded that respondent's expectation was "reasonable," *id.* at 29a-31a & n.3, and permitted him to claim the protection of the Fourth Amendment everywhere in the building, *id.* at 30a ("As [an] officer of the company, defendant has the authority to assert a fourth amendment claim to the building.").

3. A divided court of appeals affirmed. App., *infra*, 1a- 24a. Addressing respondent's capacity to claim the protection of the Fourth Amendment under the rubric of "standing," the court of appeals disagreed with the district court's conclusion that respondent had a legiti-

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[2] The government also argued that the entries into the building and the vacant office did not violate the Fourth Amendment at all, because they were justified by exigent circumstances. The district court rejected that argument. App., *infra*, 31a-33a.

mate expectation of privacy in every part of ATD's corporate offices. *Id.* at 5a ("[W]e disagree with the district court's holding that a corporate officer with a key to the building had standing to assert a Fourth Amendment claim to the entire building."). Instead, it acknowledged that courts of appeals generally have agreed that defendants may challenge searches only of those parts of their places of employment with which they have a significant "nexus"—generally speaking, their work areas. *Id.* at 8a. The court of appeals, however, concluded that sole reliance on the "nexus" requirement was "problematic" because it did not account for factors such as the individual's ownership of any property he has with him, his possessory interest in such property, and any actions he takes to protect his privacy. *Id.* at 9a-15a.

Turning to the facts of this case, the court of appeals concluded that respondent had a legitimate expectation of privacy in the vacant room at his employer's place of business, despite his lack of a prior connection to that room, because (1) the tapes respondent was attempting to view there were his, rather than his employer's; (2) the tapes were in respondent's actual possession; and (3) respondent had taken steps to protect his privacy in the room. App., *infra*, 14a-16a. Because it also concluded that warrantless entry was not justified by exigent circumstances, *id.* at 16a-20a; see also note 2, *supra*, the court of appeals affirmed the district court's suppression order. App., *infra*, 20a.

Judge Kelly dissented. App., *infra*, 20a-24a. The factors cited by the majority, Judge Kelly argued, were "not sufficient to confer standing" on a defendant "absent a demonstrated 'nexus between the area searched and the work space of the defendant.'" *Id.* at 20a (quoting *United States* v. *Britt*, 508 F.2d 1052, 1056 (5th

Cir.), cert. denied, 423 U.S. 825 (1975)). Indeed, he argued, "the court cites no case involving a workplace where standing was found in the absence of such a nexus." App., *infra*, 20a-21a.

The majority's "focus[] on * * * the videotapes in [respondent's] possession" and their relationship to respondent, Judge Kelly further observed, was misguided. App., *infra*, 22a. "Under the court's analysis," Judge Kelly noted, respondent "would have standing to challenge a search anywhere in the building provided the item seized was owned and controlled by him, and he had taken steps to maintain privacy. This analysis relies too heavily on [respondent's] possession of the seized videotapes when the primary question must be whether [respondent] had a legitimate expectation of privacy in the area searched." *Id.* at 22a-23a.

The United States filed a petition for rehearing and suggestion for rehearing en banc. The petition was denied, with five judges dissenting (Anderson, Tacha, Baldock, Ebel, and Kelly, JJ.), on December 1, 1998. App., *infra*, 40a-41a. That same day, this Court decided *Minnesota* v. *Carter*, 119 S. Ct. 469 (1998), another Fourth Amendment case involving the legitimate expectation of privacy inquiry and the capacity of individuals to claim the protection of the Fourth Amendment in a location with which they have a limited commercial connection.

REASONS FOR GRANTING THE PETITION

The court of appeals held that respondent had a reasonable expectation of privacy in an empty and unused office at his employer's place of business, even though the office was not respondent's work space and he had no prior connection to it. In particular, the court of appeals concluded that respondent's expectation of

privacy in that vacant office was "reasonable" because (1) the child pornography tapes that respondent was attempting to view there were his, rather than his employer's, (2) the tapes were in respondent's actual possession, and (3) respondent had taken steps to protect his privacy while he viewed the tapes. App., *infra*, 14a-16a. The court of appeals' decision is incorrect, improperly expands the capacity of employees to claim the protection of the Fourth Amendment in the workplace, and erroneously departs from the mode of analysis employed by other courts of appeals, and by this Court, most recently in *Minnesota* v. *Carter*, 119 S. Ct. 469 (1998).

1. Because Fourth Amendment rights "are personal" and "may not be vicariously asserted," *Alderman* v. *United States*, 394 U.S. 165, 174 (1969), a criminal defendant moving to suppress evidence on Fourth Amendment grounds "has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978). Under this Court's precedents, such a defendant "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one which has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota* v. *Carter*, 119 S. Ct. at 472 (internal quotation marks omitted); see also *Rakas*, 439 U.S. at 143 & n.12 (defendant has burden of showing (1) that he had a subjective expectation of privacy in the invaded space, and (2) that his expectation is one "that society is prepared to recognize as 'reasonable'" (quoting *Katz* v. *United*

States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))).

Although the Fourth Amendment by its terms protects the "right of the people to be secure in their persons, houses, papers, and effects"—and does not specifically mention places of employment—this Court has held that, "in some circumstances a worker" has a legitimate expectation of privacy in, and therefore "can claim Fourth Amendment protection over[,] his own workplace." *Carter*, 119 S. Ct. at 474. See *Mancusi* v. *DeForte*, 392 U.S. 364 (1968) (union employee had a sufficient connection to his office to challenge its warrantless search); *O'Connor* v. *Ortega*, 480 U.S. 709 (1987) (government workers may, under certain circumstances, have a legitimate expectation of privacy in their own private offices). The Court has cautioned, however, that "[a]n expectation of privacy in commercial premises * * * is different from, and indeed less than, a similar expectation in an individual's home." *New York* v. *Burger*, 482 U.S. 691, 700 (1987).

Consistent with this Court's decisions, the courts of appeals have generally held that individuals can claim the protection of the Fourth Amendment in those workplace areas with which they have a sufficient connection to give rise to a socially recognized privacy expectation, *i.e.*, generally speaking, their own offices and work areas. See, *e.g.*, *United States* v. *Taketa*, 923 F.2d 665, 673 (9th Cir. 1991) ("We find a privacy interest in an office reserved for one's exclusive use at a place of employment to be reasonable."); *Gillard* v. *Schmidt*, 579 F.2d 825, 828 (3d Cir. 1978) (similar). Beginning with the Fifth Circuit's decision in *United States* v. *Britt*, 508 F.2d 1052, cert. denied, 423 U.S. 825 (1975), however, the courts of appeals have in a variety of contexts rejected the notion that an employee may

claim a legitimate expectation of privacy absent a sufficient "nexus" between the employee and the location searched. *Id.* at 1056 (defendant may not challenge admission of illegally seized corporate records absent "a demonstrated nexus between the area searched and the work space of the defendant").

For example, following *Britt*, the Second Circuit has held that the inquiry into whether a corporate officer has "a reasonable expectation of privacy to challenge a search of business premises" depends primarily on the extent of his "possessory or proprietary interest in the area searched," and that such an officer "must demonstrate a sufficient 'nexus between the area searched and his own work space.'" *United States* v. *Chuang*, 897 F.2d 646, 649 (quoting *Britt*, 508 F.2d at 1056; brackets omitted), cert. denied, 498 U.S. 824 (1990). Other courts of appeals have followed suit. See, *e.g.*, *United States* v. *Mohney*, 949 F.2d 1397, 1404 (6th Cir. 1991) ("[I]t is hard to see how [the defendant] could have a reasonable expectation of privacy in documents he claimed to be completely uninvolved in preparing and which were kept in offices he claimed to rarely visit."), cert. denied, 504 U.S. 910 (1992); *Taketa*, 923 F.2d at 671 (defendant lacked sufficient connection to his co-conspirator's office, which was next to his own, to claim the protection of the Fourth Amendment there, even though he had access to that office and used it for his own illegal activities).[3] As Professor LaFave has summarized:

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[3] These cases have arisen in contexts that in some respects differ from the facts here. In *Chuang*, 897 F.2d at 650, for example, the defendant owned almost half of the bank that was searched, but the records that were searched were "subject to periodic examination" by bank regulators in any event; and in *Taketa*, 923 F.2d at 671, the defendant was not inside (and had no

> In the absence of some other basis for showing [a legitimate expectation of privacy, such as a property interest in the area searched], it still seems necessary to establish that the place searched was rather directly connected with the defendant's employment responsibilities and activities. Thus, a corporation president has been held to have standing with respect to the seizure of corporate records from his office, but not as to the seizure of such records from a storage area where he never spent any of his time working.

5 Wayne R. LaFave, *Search and Seizure* § 11.3(d), at 164-165 (3d ed. 1996) (footnotes omitted).[4]

2. Analyzing respondent's capacity to claim the protection of the Fourth Amendment under the rubric of "standing," the court of appeals in this case criticized and chose to depart from the "nexus" approach. In par-

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personal possessions in) the searched office at the time of the search. Nonetheless, the starting point for each of the cases was the same. In each, the court recognized the need for the defendant to establish a sufficient connection or nexus between himself and the area searched to give rise to an expectation of privacy that society is prepared to treat as reasonable, and concluded that, in the workplace environment, that expectation ordinarily is limited to an employee's usual office or work area. See, *e.g.*, *Chuang*, 897 F.2d at 649; *Taketa*, 923 F.2d at 671.

[4] See also *Tobias* v. *State*, 479 N.E.2d 508, 510 (Ind. 1985) (following *Britt* and holding that the defendant, who worked in his father's pharmacy, had not established the necessary "nexus" with a pharmacy bathroom that he visited solely "for the purpose of making the instant drug transactions"); *People* v. *Johnson*, 209 A.D.2d 721, 721, 619 N.Y.S.2d 154, 155 (N.Y. App. Div. 1994) (defendant lacked sufficient connection to basement in her workplace to show a reasonable expectation of privacy where "her only connection with [the basement] was her occasional use of the bathroom").

ticular, the court of appeals held that the "nexus" approach "does not account," App., *infra*, 9a-10a, for three factors that court thought significant—the defendant's "ownership" interest in evidence seized as a result of the search, *id.* at 10a; the defendant's immediate possession of that evidence at the time of the search, *id.* at 13a; and the defendant's efforts "to maintain" his or her privacy, *id.* at 13a-14a. The court of appeals then held that those three factors conferred on respondent the right to claim the protection of the Fourth Amendment. Respondent, the court concluded, had a legitimate expectation of privacy in the vacant office, with which he had no prior connection, because (1) the tapes respondent was attempting to view there were his, rather than his employer's, (2) the tapes were in respondent's actual possession, and (3) respondent had taken steps to protect his privacy while he viewed the tapes. *Id.* at 14a-16a.

Even setting aside the court of appeals' mistaken description of its inquiry as one of "standing,"[5] the court's rationale for departing from the approach taken by the other courts of appeals and this Court is

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[5] This Court repeatedly has explained that a defendant's capacity to seek the suppression of evidence based on an asserted violation of the Fourth Amendment is not a question of standing but rather is properly viewed as a question of substantive Fourth Amendment law. See *Carter*, 119 S. Ct. at 472 (state court improperly addressed the question "under the rubric of 'standing' doctrine, an analysis which this Court expressly rejected 20 years ago in *Rakas*, 439 U.S., at 139-140[.] * * * Central to our analysis was the idea that in determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the 'definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'") (quoting *Rakas*, 439 U.S. at 140).

unsound. Whether or not a defendant has the "reasonable expectation of privacy" necessary to claim the protection of the Fourth Amendment in a location depends generally on the nature and extent of the defendant's connection to that location, and specifically on whether that connection is sufficient to give rise to a privacy expectation that society shares and respects. Neither the fact that respondent owned and possessed the tapes he carried into the room, nor his attempt to conceal his presence there, sufficiently enhances the nature of respondent's relationship to that otherwise vacant and unused office to give rise to an expectation of privacy reflected in the "understandings that are recognized and permitted by society." *Carter*, 119 S. Ct. at 472.

As Judge Kelly explained in dissent, the mere fact that the videotapes that respondent was attempting to view were his own, not his employer's, "does not mean that we can overlook the nature of the area searched." App., *infra*, 21a; see also *id.* at 20a-21a (Kelly, J., dissenting) ("It is telling that the court cites no other case involving a workplace where standing was found in the absence of such a nexus.").[6] Respondent also

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[6] The majority's contention (App., *infra*, 10a n.2) that *United States* v. *Mancini*, 8 F.3d 104 (1st Cir. 1993), supports its decision is incorrect. In that case, the court of appeals considered whether the defendant, the Mayor of North Providence, Rhode Island, had a "privacy interest in a box in the archive attic" where the Mayor's papers were regularly stored. See 8 F.3d at 109. Because that area was regularly used to store the defendant's possessions throughout his 19-year tenure as Mayor, the defendant's possessions were clearly labeled and segregated from the other materials stored there, and no one was permitted to look into the defendant's files without the defendant's permission, *id.* at 110, the court concluded that the defendant had established a sufficient nexus between

presumably owned and possessed the clothes he was wearing, and the wallet that he had in his pocket. Yet no one contends that his ownership and possession of those items adds any weight to the contention that society would treat his claim to privacy in an otherwise vacant office as reasonable. There is no reason why respondent's ownership and possession of the tapes from which he was attempting to view child pornography should be treated differently.[7] Thus, while respondent may have had a protected privacy expectation with respect to private property and personal effects that were on his person, hidden from public view (*e.g.*, the contents of his wallet), that expectation of privacy does not permit him to object to entries into all rooms or offices in which he, together with those items, happens to be present.

To the contrary, when considering property interests in this context, the proper focus is on the defendant's

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himself and the area searched to support a reasonable expectation of privacy.

[7] The majority's focus on respondent's possessory or property interest in the items seized also appears to confuse the privacy interests protected by the Fourth Amendment's bar on unreasonable searches with the possessory interests protected by that Amendment's prohibition on unreasonable seizures. To the extent respondent merely challenges the entry into the room in which he was found, the question is whether that *search* violated a protected privacy interest personal to respondent. The fact that respondent possessed his tapes when entry was made does not bear on his privacy expectation (if any) in the room. To the extent respondent challenges the *seizure* of the tapes once the police made entry, his possessory and ownership interests in the tapes are relevant. See *Soldal* v. *Cook County*, 506 U.S. 56, 61 (1992). But if entry into the vacant room and respondent's arrest did not violate his rights, the seizure of the tapes was undeniably proper as incident to respondent's arrest.

relationship to the searched location, because "one who owns or lawfully possesses or controls [that] property will in all likelihood have a legitimate expectation of privacy by virtue of th[e] right to exclude" others from that location.[8] *Rakas*, 439 U.S. at 144 n.12. Legal ownership and possession of personal property that the defendant carries into the area searched, however, does not by itself create a similar right or a similar privacy expectation. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 106 (1980) (ownership of drugs found in a purse does not give rise to legitimate expectation of privacy in purse that the defendant neither owned nor controlled). As a result, the fact that respondent owned and possessed the tapes he transported into the vacant office with which he had no prior connection does not establish a socially recognized privacy expectation, any more than it would if respondent had carried those same objects into a hallway closet, the hallway itself, or into a public street.[9]

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[8] In a footnote, the court of appeals suggested that respondent had the right or power to exclude entrants from the vacant office. App., *infra*, 15a n.3. But the court gave no source of authority for that suggestion, which is entirely unsupported by the record, and which does not support the result in this case in any event. A security guard might have authority or power to exclude others from a building, but it does not necessarily follow that he has a reasonable expectation of privacy in every room and office in the building.

[9] The distinction between ownership of the invaded place and ownership of the evidence discovered through the invasion also explains why the court of appeals' reliance (App., *infra*, 12a) on the plurality opinion in *O'Connor* v. *Ortega*, 480 U.S. 709 (1987), is misplaced. In *O'Connor*, the plurality did note that employees do not necessarily lose their expectation of privacy with respect to the contents of closed luggage, handbags, or briefcases when they bring those items to the office; but it also noted that the

The Tenth Circuit likewise erred in focusing on respondent's efforts to protect his privacy. App., *infra*, 15a. Those efforts may show a subjective expectation of privacy, and absent such efforts, unaided observation without entry might not constitute a "search" within the meaning of the Fourth Amendment. See *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *California* v. *Greenwood*, 486 U.S. 35, 41 (1988) (same); *United States* v. *Dunn*, 480 U.S. 294, 303-304 (1987) (no unconstitutional search where officers viewed area from "the open fields" or "a public place", even if the area they viewed "could not be entered * * * without a warrant"). But efforts to maintain privacy in an area with which the defendant lacks the appropriate connection—be it a public thoroughfare, the home of another, or (as here) a vacant and otherwise unused office—cannot give the defendant a personal and reasonable privacy expectation where it otherwise would be lacking. See *New York* v. *Class*, 475 U.S. 106, 114 (1986) ("[E]fforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist."); App., *infra*, 24a (Kelly, J., dissenting) ("The steps [respondent] took to ensure privacy may be consistent with a subjective expectation of privacy, but that is not enough, no matter how earnestly the steps were taken."). Indeed, in *Carter*,

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employees' expectation of privacy in the outward appearance of those items might be affected by bringing them into the employer's place of business. 480 U.S. at 716. The plurality's analysis thus is consistent with focusing the inquiry on where, within a business, a search takes place, and in rejecting the view that simple possession of personal property creates an expectation of privacy everywhere in the workplace.

119 S. Ct. at 471, this Court held that the defendants lacked the capacity to claim the protection of the Fourth Amendment in an apartment in which they were temporary business visitors, even though they had taken the precaution of drawing the window blinds to prevent observation. See also note 10, *infra*.

3. The court of appeals' decision in this case is particularly difficult to reconcile with the reasoning of this Court's most recent reasonable-expectation-of-privacy decision, *Minnesota* v. *Carter*, *supra*, which was decided the same day the court of appeals denied rehearing en banc in this case. In *Carter*, this Court held that the defendants, who were present in someone else's home for two-and-one-half hours for the sole business purpose of packaging narcotics, did not have a legitimate expectation of privacy there. Notably, this Court did not accord legal significance to *any* of the factors the court of appeals found to be dispositive here. In *Carter*, the defendants owned the drugs they were packaging, just as respondent here owned the child pornography tape he was attempting to view. See 119 S. Ct. at 471-472. In *Carter*, the defendants had the drugs in their immediate possession, just as respondent here had the child pornography tape in his immediate possession. See *id.* at 471. And, in *Carter*, the defendants had taken precautions to preserve their privacy, lowering the blinds, much as respondent did here. *Ibid.*[10] Yet none of those factors played any role in the Court's analysis.

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[10] The defendants in *Carter* ultimately were not entirely successful in preserving their privacy, as a "gap" in the blinds permitted an officer, standing one to one-and-one half feet from the window, to see inside. See 119 S. Ct. at 471; *id.* at 480 (Breyer, J., concurring). Nonetheless, neither the defendants' effort to

To the contrary, the Court in *Carter* relied on precisely the mode of analysis that the court of appeals held insufficient in this case: it looked exclusively to the relationship between the defendants and the invaded space. In particular, the Court concluded that the defendants in *Carter* lacked a legitimate expectation of privacy in the apartment because they were present there for just two-and-one-half hours, a relatively brief period of time; because they had no prior relationship to the apartment's lessee, and thus were not in any sense treated as members of the household; and because their relationship to the apartment was strictly commercial in nature, as they were using it to package narcotics. See 119 S. Ct. at 473-474. Moreover, rejecting any analogy between the apartment and a private workplace office in which the defendants might have been able to claim a privacy expectation, see *O'Connor* v. *Ortega*, *supra*, the Court noted that "there is no indication that [defendants] in this case had nearly as significant a connection to [the] apartment as the worker in *O'Connor* had to his own private office." 119 S. Ct. at 474.

A comparable analysis applies here as well. Respondent was in the vacant office not a matter of hours, like the defendants in *Carter*, but rather a matter of minutes; he had absolutely no prior connection to that office; and the entire workplace, including the vacant office in which respondent was discovered, was a commercial premise that did not function as a "home." App., *infra*, 2a, 8a n.1, 27a & n.1. Moreover, here, as in *Carter*, "there is no indication that [respondent] had nearly as significant a connection to [the vacant and

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preserve their privacy, nor their lack of success, figured into the majority's analysis.

unused office where he was found] as the worker in *O'Connor* had to his own private office." 119 S. Ct. at 474. If the defendants' connection with the apartment in *Carter* can be described as "fleeting and insubstantial," *id.* at 479 (Kennedy, J., concurring), respondent's connection with the vacant office in which he was found was virtually "nonexistent." App., *infra*, 20a (Kelly, J., dissenting). Other than mere presence for the illegitimate purpose of viewing child pornography, respondent had no connection to the vacant office at all. For that reason, the court of appeals' decision also comes perilously close to reviving in the workplace context the "legitimately on premises" standard that this Court rejected in *Rakas* over two decades ago. See 439 U.S. at 141-143.

4. The improper analysis that the court of appeals conducted in finding a violation of respondent's Fourth Amendment rights warrants this Court's attention. The court of appeals' decision not only parts company with the mode of analysis employed by this Court and other courts of appeals, which generally looks to whether the search occurred in the employee's own workspace, but also introduces unnecessary uncertainty into this area of law and improperly expands the Fourth Amendment's protections in the workplace—potentially to any employee who enters a room at his place of employment with possessions in hand and shuts the door behind him. App., *infra*, 22a (Kelly, J., dissenting). Such an overbroad response to a Fourth Amendment violation impedes "the search for truth at trial" by depriving the trier of fact of "[r]elevant and reliable evidence." *Rakas*, 439 U.S. at 137. Indeed, in this very case, the Tenth Circuit's decision will (if not reversed) require the jury to decide the issue of guilt without ever learning that respondent was caught attempting

to view the child pornography tapes that were delivered to him; without the benefit of the evidence discovered in respondent's office after he consented to its search; and without any knowledge of respondent's confession of involvement in child pornography.

Because the court of appeals' decision departs from the mode of analysis employed by this Court and other courts of appeals, and because it undermines predictability in this area of law and the truthfinding mission of trial, it ordinarily would warrant this Court's plenary review. As noted above, however, the panel that decided this case issued its decision months before this Court announced its most recent decision in the reasonable expectation of privacy area, *Minnesota* v. *Carter*, *supra*, and the court of appeals as a whole denied rehearing en banc, with five judges dissenting, on the same day *Carter* was decided. The court of appeals thus has not had the opportunity to examine this case in light of this Court's analysis in *Carter*. This Court may wish to give it the opportunity to do so before granting plenary review. Accordingly, it would be appropriate for the Court to grant the petition, vacate the judgment below, and remand for reconsideration in light of the Court's decision in *Carter*. In the alternative, the petition should be granted and the case set for argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of the Court's decision in *Carter*. Alternatively, the petition should be granted.

Respectfully submitted.

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MARCH 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-6310

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES S. ANDERSON, DEFENDANT-APPELLEE

[Filed: Sept. 15, 1998]

Before: PORFILIO, KELLY, and BRISCOE, Circuit Judges.

BRISCOE, Circuit Judge.

The government appeals the district court's order granting James Anderson's motion to suppress evidence seized in a warrantless search. We exercise jurisdiction pursuant to 18 U.S.C. § 3731 and affirm.

I.

Anderson was arrested after a successful FBI sting operation. The goal of the sting operation was to identify and prosecute members of the Internet chat room known as the "Orchid Club" for interstate trafficking of child pornography. The Orchid Club investigation began in California and proceeded to Oklahoma City with the arrest of Paul Buske in June 1996. Following his arrest, Buske cooperated with the government in an

undercover capacity by contacting a fellow Orchid Club member who used the pseudonym "AnnBoleyn" and arranging to trade him child pornography. "AnnBoleyn" was to send Buske blank videotapes to use to tape child pornography. Buske would then send the tapes back to "AnnBoleyn" at a prearranged mail box. The FBI suspected Anderson was "AnnBoleyn" and arranged for a controlled delivery of blank tapes to the specified mail box and secured a search warrant for Anderson's home in Duluth, Georgia. These suspicions were confirmed when Anderson picked up the tapes sent to "AnnBoleyn."

The tapes were to be delivered on Friday, July 5, 1996, but were delayed until Saturday, July 6, because of the Fourth of July holiday. The mail box business where the tapes were delivered was closed on Saturday, but Anderson had arranged for the business to leave the package at an adjoining coffee shop. Anderson went to the coffee shop on Saturday, July 6, to pick up the package. FBI agents, including Agent Bradley, observed Anderson pick up the package and drive away in his car. Instead of traveling to his home, Anderson drove to his place of employment. Anderson was Vice President of Research and Development for ATD Corporation. Anderson used his key card to enter the ATD office building, taking the tapes with him, and the door locked behind him.

As the agents were concerned Anderson would view the tapes and suspect the involvement of law enforcement when he discovered the tapes were blank, they decided to immediately arrest him. They knocked on the office building doors and activated a siren on a patrol car, but Anderson did not respond. The agents did not know Anderson is hearing impaired and that he

did not hear the knocks or the siren because he was not wearing his hearing aids. When Anderson failed to respond, the agents became concerned he was destroying the tapes and other child pornography evidence. Agent Bradley testified his concern was heightened because he thought the building might contain an incinerator. He based this belief on his knowledge that ATD Corporation was involved in the research and development of heat resistant materials. The agents' concern that Anderson would destroy evidence was also based on Agent Bradley's previous experiences in investigating Orchid Club members. Agent Bradley had found members of the group to be extremely suspicious and fearful of being "set up" by agents. As a result of his prior investigations of Orchid Club members, Agent Bradley also knew they tended to keep their collections in one location. If Anderson had decided to view the tapes at his office, the agents were concerned his entire collection was stored there and that he would destroy all evidence if he was alerted to their presence.

Acting on these concerns, the agents broke into the office building and began searching for Anderson. Anderson did not hear them calling his name. Agent Bradley noticed a light under the closed door of Room 222, an interior office. Room 222 had a single door leading to the hallway, a narrow sidelight window next to the door and one other window. Agent Bradley could not see into the room because the door was closed and the curtains were drawn over the sidelight window with a towel attached to the curtains to further block any view into the room. Agent Bradley opened the unlocked door without knocking and found Anderson preparing to watch one of the videotapes.

Anderson signed a written waiver of his *Miranda* rights, made incriminating statements to the agents detailing his involvement with child pornography on the Internet, and admitted he had child pornography stored in his office. Anderson then gave consent to search his office, Room 218. The agents did not perform a general search of Anderson's office, but rather recovered the pornography from the location identified by Anderson. Shortly thereafter, Anderson and the agents went to Anderson's home and the agents executed the search warrant. Upon arrival at his home, Anderson told his wife the agents were there because he possessed child pornography. Anderson then showed the agents where he had stored the disks and tapes of child pornography. While at Anderson's home, approximately four hours after entry into his office building, Anderson signed a written consent to search both his office building and his home.

Anderson was indicted on August 6, 1996, for engaging in a conspiracy to knowingly receive and distribute child pornography via the Internet, in violation of 18 U.S.C. § 2252(a)(2)(b), and two counts of knowingly transporting and shipping child pornography, in violation of 18 U.S.C. § 2252(a)(1). Anderson moved to suppress the evidence seized from his place of employment and his residence, as well as statements made by him at both locales. The district court found Anderson had standing to seek suppression and ordered suppression of the evidence seized from Anderson's office building and the statements made while he was interrogated at his office building. The court denied suppression of evidence seized from his home and statements he made to his wife in the presence of the agents because the search of his home was made pursuant to a valid

warrant and his statements there were spontaneous and not the result of any police questioning.

In suppressing the evidence seized and statements taken at the office building, the district court concluded Anderson had standing to assert his Fourth Amendment rights. The court concluded Anderson's actions demonstrated a subjective expectation of privacy in Room 222. The court then concluded this expectation was reasonable by first finding a corporate officer may assert a reasonable expectation of privacy to his or her corporate office, and since Anderson was a corporate officer with a master key to the corporate building and offices therein, except for the president's office, he had standing to assert a Fourth Amendment claim to the entire building. While we disagree with the district court's holding that a corporate officer with a key to the building has standing to assert a Fourth Amendment claim to the entire building, we ultimately agree with the district court that Anderson had standing to seek suppression of the evidence and statements obtained as a result of the search of Room 222, but we reach that conclusion by a different route. *See United States v. Winningham*, 140 F.3d 1328, 1332 (10th Cir. 1998) (court can affirm district court on different basis as long as there is support in the record). We also agree with the district court that the government did not establish the existence of exigent circumstances justifying the warrantless entry into the office building.

The government appeals that portion of the district court's order granting suppression of evidence seized from Room 222 and statements made during that seizure. The government contends Anderson lacks standing to challenge the search of an area within his corporate office building when Anderson has shown neither

proprietary nor possessory interest in Room 222, nor a business nexus between his work and Room 222. The government also contends there was sufficient evidence to establish exigent circumstances to justify the warrantless entry into the office building.

II.

Standing

We must first determine whether Anderson has standing to challenge the search and seizure of items from Room 222. "Whether a defendant has standing to challenge a search is a legal question subject to de novo review." *United States v. Shareef*, 100 F.3d 1491, 1499 (10th Cir. 1996).

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless search is unreasonable, and therefore unconstitutional, if the defendant has a legitimate expectation of privacy in the area searched. "Determining whether a legitimate or justifiable expectation of privacy exists . . . involves two inquiries." *United States v. Leary*, 846 F.2d 592, 595 (10th Cir. 1988). First, the defendant "must show a subjective expectation of privacy in the area searched, and second, that expectation must be one that 'society is prepared to recognize as "reasonable."'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 525, 104 S.Ct. 3194, 82 L. Ed. 2d 393 (1984)). The "ultimate question" is whether one's claim to privacy from the government intrusion is reasonable in light of all the surrounding circumstances. *Id.* Thus, Anderson was required to establish he had a subjective expectation of privacy in

Room 222 and that society would recognize that subjective expectation of privacy as reasonable.

Anderson entered the ATD office building during a holiday weekend and there were no other employees in the building. He used his corporate key card to enter the building and the door locked behind him. Once he was inside Room 222, he closed the door. The blinds and curtains were closed over one window, the curtains were closed over the sidelight window, and Anderson had attached a towel over the sidelight window curtains to further block any view into the room. Clearly he believed he would be alone and left undisturbed. Accordingly, we conclude Anderson had a subjective expectation of privacy in Room 222.

Whether Anderson's subjective expectation of privacy is one society is prepared to recognize as reasonable is a more difficult inquiry. "Given the great variety of work environments . . . the question whether an employee has a reasonable expectation of privacy [in his work area] must be addressed on a case-by-case basis." *O'Connor v. Ortega*, 480 U.S. 709, 718, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987); *see also Henzel v. United States*, 296 F.2d 650, 653 (5th Cir. 1961) ("This is not to say that every employee of a corporation can attack the illegal seizure of corporate property. . . . Each case must be decided on its own facts."). In addressing this question, we are mindful that the "'expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home.'" *Leary*, 846 F.2d at 597 n. 6 (quoting *New York v. Burger*, 482 U.S. 691, 700, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987)).

It is well established that an employee has a reasonable expectation of privacy in his office. *See Mancusi v.*

DeForte, 392 U.S. 364, 369, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968); *Leary*, 846 F.2d at 595 ("There is no doubt that a corporate officer or employee may assert a reasonable or legitimate expectation of privacy in his corporate office."); *Specht v. Jensen*, 832 F.2d 1516, 1520 (10th Cir. 1987). Therefore, Anderson clearly had standing to challenge the search of his office. However, Room 222 was not Anderson's office.[1] Therefore, we must determine to what extent an employee has standing to challenge the search of an area in his workplace that is not his office. We begin by acknowledging, as at least one other circuit has done, that a corporate employee does not have standing to challenge the search of corporate offices or other property merely because the employee has access to or control over certain areas. *See United States v. Baron-Mantilla*, 743 F.2d 868, 870 (11th Cir. 1984) (mere possession of a key to the premises searched is insufficient to confer standing).

Most cases that discuss employee standing involve seizure of work-related documents from the workplace. In such cases, the relationship or "nexus" of the employee to the area searched is an important consideration in determining whether the employee has standing. *See United States v. Mohney*, 949 F.2d 1397, 1403-04 (6th Cir. 1991) (en banc) (defendant did not have standing to challenge seizure of documents which he did not prepare when they were stored in offices he rarely

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[1] Room 222 was an empty room with no files or a desk, or even a telephone. There was no name plate on the door. There is no indication in the record that Anderson used the room on a regular basis or even on a single occasion before July 6, 1996. A company official testified that Room 222 was a vacant room that could be used by all personnel. Anderson testified the room was vacant and "had no use at all." Appellant's App. at 98.

visited); *United States v. Taketa*, 923 F.2d 665, 670-71 (9th Cir. 1991) (defendant did not have standing to challenge search of coworker's desk in adjoining office even though he had access to it, but he did have standing to challenge search of his own desk); *United States v. Chuang*, 897 F.2d 646, 649-51 (2d Cir. 1990) (defendant could not challenge seizure of documents found in another employee's office); *United States v. Torch*, 609 F.2d 1088, 1091 (4th Cir. 1979) (defendant did not have standing to challenge search of building when he was not present at time of search, he did not work for building owner although he occasionally used the building, he did not have assigned work area, and the desk he occasionally used was not locked and all employees had access to it); *United States v. Britt*, 508 F.2d 1052, 1056 (5th Cir. 1975) (corporate president did not have standing to challenge seizure of documents from off-site warehouse because he failed to demonstrate a "nexus between the area searched and [his] work space").

We endorse the "business nexus" test to the extent we share the belief that an employee enjoys a reasonable expectation of privacy in his work space. Certainly, an employee should be able to establish standing by demonstrating he works in the searched area on a regular basis. However, we do not believe the fact that a defendant does or does not work in a particular area should categorically control his ability to challenge a warrantless search of that area. Instead, the better approach is to examine all of the circumstances of the working environment and the relevant search. *See Mancusi*, 392 U.S. at 368, 88 S. Ct. 2120 (performing standing inquiry "in light of all the circumstances"). There are numerous circumstances which are highly relevant when considering whether an employee should

have standing to contest the search and seizure of items from his workplace for which the "business nexus" test does not account.[2]

Ownership of an item does not confer "automatic standing." However, the Supreme Court has long recognized that property ownership is a "factor to be considered in determining whether an individual's Fourth Amendment rights have been violated." *United States v. Salvucci*, 448 U.S. 83, 91, 100 S. Ct. 2547, 65 L.Ed.2d 619 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 105, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980) ("[P]etitioner's ownership of the drugs is undoubtedly one fact to be considered in [determining whether he has standing]"); *see also United States v. Benitez-Arreguin*, 973 F.2d 823, 827 (10th Cir. 1992) ("In analyzing the case of a bailee, we consider the factors that generally might give any defendant a legitimate expectation of privacy, *includ-*

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[2] Contrary to the dissent's assertion that we have failed to reference any case in which a defendant has been determined to have standing in the absence of a nexus between the area searched and the defendant's work space, *see* Dissenting Op. at 1234-35, we cite *United States v. Mancini*, 8 F.3d 104, 108 (1st Cir. 1993) (defendant worked downstairs and seized items were found in storage space in attic), where the court emphasized the importance of (1) the fact that the items seized were at least partially personal possessions, (2) the fact that defendant was mayor of the city, (3) the fact that the attic was in the same building as defendant's office, (4) the fact that the mayor had taken steps to insure his privacy in the items seized. As in the present case, there was no indication the mayor had ever worked in the attic or regularly used the attic before the evidence was seized, the attic was located far from the mayor's office, and the attic was accessible by numerous employees (the entire maintenance and personnel departments). Further, we cite several additional cases where courts have found no standing where there was no business nexus, but each case also emphasized the items seized were *not* personal possessions.

ing ownership, lawful possession, or lawful control *of the property* or place searched.") (emphasis added); *United States v. Erwin*, 875 F.2d 268, 270-71 (10th Cir. 1989) ("Although ownership of the item seized is not determinative, it is an important consideration in determining the existence and extent of a defendant's Fourth Amendment interests."). Thus, a court is more apt to find an employee has standing to challenge the seizure of personal items or the search of an area where personal items are stored than the search or seizure of work-related documents or materials. This is true even when an employee brings personal possessions into the workplace where they are obviously not as secure as they would be at home. *See United States v. Mancini*, 8 F.3d 104, 108 (1st Cir. 1993) (court emphasized seized books were at least partially personal possessions); *cf. Williams v. Kunze*, 806 F.2d 594, 599-600 (5th Cir. 1986) (in denying standing, court emphasized seized records were corporate property); *State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996) (finding defendant did not have standing when "nothing about the [seized] items or the manner in which they were stored reveals anything of personal or private nature"); *State v. Worrell*, 233 Kan. 968, 666 P.2d 703, 706 (1983) (court emphasized defendant stored no personal property in warehouse where he was asserting standing). In *O'Connor*, the Supreme Court discussed the effect on the issue of standing when property seized from a defendant's workplace is personal property rather than business property:

> Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the

> workplace context. The workplace includes those areas and items that are related to work and are generally within the employer's control. At a hospital, for example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace. These areas remain part of the workplace context even if the employee has placed personal items in them, such as a photograph placed in a desk or a letter posted on an employee bulletin board.
>
> *Not everything that passes through the confines of the business address can be considered part of the workplace context, however.* An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the contents of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address.

480 U.S. at 715-16, 107 S. Ct. 1492 (emphasis added). *See also* Wayne R. LaFave, Search & Seizure § 11.3(d) ("Particularly in an otherwise close case, a court may be influenced by the defendant's relationship to or interest in the particular item seized. It may be significant, therefore, that this item is a personal possession of the defendant and not something connected with the operation of the business.").

Moreover, we believe an employee has a greater expectation of privacy in items in his immediate control, regardless of the business connection he may or may not have to the room where the items are found. *See United States v. Brien*, 617 F.2d 299, 306 (1st Cir. 1980) (citing as one factor supporting existence of standing the fact that defendant was present during search); LaFave § 11.3(d) ("Generally, it may be said that the fundamental inquiry is whether the particular defendant had a protected expectation of privacy, and that in making this determination it is useful to consider such factors as *whether the defendant was present at the time of the search.*") (emphasis added); *cf. United States v. Cardoza-Hinojosa*, 140 F.3d 610, 616 (5th Cir. 1998) (emphasizing defendant left scene aware building was not locked); *Taketa*, 923 F.2d at 671 (emphasizing fact that defendant was not present at time of search in ruling defendant did not have standing); *Torch*, 609 F.2d at 1091 (same). Focusing on the defendant-employee's control over the seized item at the time of the seizure is consistent with the approach taken by the Supreme Court in *Mancusi*. In *Mancusi*, the defendant claimed he had standing to challenge seizure of records from an office he shared with others. The Court noted defendant shared his office with others and the seized records were not located in an area of the room which was "reserved for his personal use," but ultimately held defendant had standing. In reaching this conclusion, the Court emphasized defendant worked in the area and defendant "*had custody of the papers at the moment of their seizure.*" 392 U.S. at 369, 88 S. Ct. 2120 (emphasis added).

Finally, we find the "business nexus" test problematic in that it does not take into account any actions the

individual challenging the seizure may or may not have taken to maintain privacy with respect to the item. We believe it is appropriate to consider whether an employee took steps to keep his personal property private in the workplace in determining whether the employee had a reasonable expectation of privacy in the area searched. *See Mancini*, 8 F.3d at 110 (court focused on fact that mayor had clearly marked seized books as private property); *cf. Cardoza-Hinojosa*, 140 F.3d at 616 (defendant did not have standing to challenge search of shed where circumstances revealed a "careless (if not nonexistent) effort" to maintain privacy interest therein); *United States v. Alewelt*, 532 F.2d 1165, 1168 (7th Cir. 1976) (defendant did not have standing to challenge seizure of his coat which he stored on a coat rack in general working area of public building); *Richards*, 552 N.W.2d at 205 (court emphasized defendant stored personal item in workplace without marking it as his own); *see also* LaFave § 11.3(d) ("Assessment of a defendant's privacy expectation vis-a-vis the item may also be aided by considering if he *dealt with that item in a fashion which reflects an effort on his part to maintain privacy.*") (emphasis added); *Specht*, 832 F.2d at 1520 (highlighting fact that defendant closed his office doors and drapes when he left his office).

Therefore, in determining whether an employee has standing to challenge seizure of an item from the workplace, we do not limit our analysis to the "business nexus" test. Rather, we will consider all of the relevant circumstances, including (1) the employee's relationship to the item seized; (2) whether the item was in the immediate control of the employee when it was seized;

and (3) whether the employee took actions to maintain his privacy in the item.[3]

Anderson entered the locked ATD office building on a Saturday, during a holiday weekend, with the videotapes. These tapes were not ATD property but were Anderson's personal possessions. He took the tapes into Room 222, shut the door behind him, and covered the sidelight window. He clearly took these actions to maintain his privacy. Anderson maintained control over the videotapes and did not abandon the tapes or even try to store the tapes in the room. In fact, he was still in possession of the tapes when the agents searched Room 222 and seized them. Under these circumstances, we conclude Anderson's subjective expectation of privacy was an expectation that society would recognize as reasonable. We hold Anderson has standing to challenge the government's search and seizure

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[3] The government argues the so-called "apartment cases" control. *See, e.g., United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993). We disagree. These cases stand for the proposition that a tenant does not have a reasonable expectation of privacy in common areas such as the hallways of an apartment building. There are significant differences between a tenant's relationship to a hallway in his apartment building and Anderson's relationship to Room 222. While both would presumably have total access to the respective areas, Anderson also had the authority to exclude others from Room 222. Obviously, a tenant does not have the authority to exclude others from a common hallway. The right to exclude others is an important consideration in determining whether an individual has standing. *See Rakas v. Illinois*, 439 U.S. 128, 148-49, 99 S. Ct. 421, 58 L.Ed.2d 387 (1978); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697 (1960); LaFave § 11.3(c). Anderson did in fact exclude others from Room 222 by closing the door and covering the sidelight window.

of items from Room 222, as well as the statements Anderson made in relation to that search.

Exigent circumstances

The warrantless search of the ATD office building was presumptively unconstitutional unless the government can establish an exception to the warrant requirement existed at the time the building was searched. "The notion that emergency circumstances may in appropriate cases make a warrantless search constitutional if probable cause exists is a clearly established exception to the warrant requirement." *United States v. Aquino*, 836 F.2d 1268, 1270-71 (10th Cir. 1988). "The existence of exigent circumstances is a mixed question of law and fact." *United States v. Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992). "Although we accept underlying fact findings unless they are clearly erroneous, 'the determination of whether those facts satisfy the legal test of exigency is subject to de novo review.'" *Id.* (quoting *United States v. Stewart*, 867 F.2d 581, 584 (10th Cir. 1989)).

The government bears the burden of proving exigency. *United States v. Wicks*, 995 F.2d 964, 970 (10th Cir. 1993). In assessing whether the burden was met, we are guided by the realities of the situation presented by the record. We should evaluate the circumstances as they would have appeared to prudent, cautious, and trained officers. *Id.* There is no absolute test for determining whether exigent circumstances are present because such a determination ultimately depends on the unique facts of each controversy. However, we have recognized certain general factors. *Id.*

> An exception to the warrant requirement that allows police fearing the destruction of evidence to

> enter the home of an unknown suspect should be (1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indications of exigency that are not subject to police manipulation or abuse.

United States v. Carr, 939 F.2d 1442, 1448 (10th Cir. 1991). Finally, we should remember that, "[a]s an exception to the warrant requirement, exigent circumstances must be 'jealously and carefully drawn.'" *Anderson*, 981 F.2d at 1567 (quoting *Aquino*, 836 F.2d at 1270).

Since the agents witnessed Anderson retrieve the controlled package from the coffee shop and carry the package into the ATD office building, there was probable cause to believe Anderson had committed a crime at the time the agents entered the office building. Further, distribution and production of child pornography are serious crimes. *See United States v. Moore*, 916 F.2d 1131, 1139 (6th Cir. 1990) ("Child pornographers commit serious crimes which can have devastating effects upon society and, most importantly, upon children who are sexually abused."). However, whether the agents conducted a limited search of the building is a closer question. Agent Bradley testified he and the other agents searched for Anderson throughout the building and, after he was located, the agents conducted a search of Room 222 and a limited search of Anderson's office. However, the initial search for Anderson, broad as it was, was at least partially necessary because of

Anderson's hearing impairment. The later search of Anderson's office was based on his consent.

The decisive consideration in this case is the government's failure to demonstrate the presence of any "circumstances where the destruction of evidence is likely" or any "clearly defined indications of exigency." *Carr*, 939 F.2d at 1448. To constitute "exigent" circumstances, the government must present something more than an unfounded belief by law enforcement officers on the scene that the suspect is becoming suspicious or nervous. *See, e.g., United States v. Scroger*, 98 F.3d 1256, 1259-60 (10th Cir. 1996), *cert. denied* — U.S. ——, 117 S.Ct. 1324, 137 L. Ed. 2d 485 (1997) (defendant answered door with drug manufacturing equipment in hand; defendant's hands were stained, an indication of drug manufacturing; and there was a strong odor of drugs from the house); *Carr*, 939 F.2d at 1446-49 (officers smelled drugs and heard commotion and shouting inside room); *Aquino*, 836 F.2d at 1273 (suspects were released, creating possibility news of police involvement in operation would spread, and drug courier's phone rang during the delay); *United States v. Chavez*, 812 F.2d 1295, 1299-1301 (10th Cir. 1987) (garage doors shut and lights off when police arrived); *see also Wicks*, 995 F.2d at 971 (collecting cases).

To support its likelihood of destruction of evidence and exigency arguments, the government essentially points to three factors: (1) Agent Bradley's belief that Anderson's entire child pornography collection was being stored inside the office building; (2) Agent Bradley's concern about the presence of an incinerator in the office building; and (3) Anderson's failure to respond to the agents knocking on the office doors or to the patrol car siren. Based on his previous law enforce-

ment experience, it may have been reasonable for Agent Bradley to believe other contraband was stored inside the office building. Nevertheless, that factor alone was insufficient to justify a warrantless entry and search. *Anderson*, 981 F.2d at 1567-68. As for the presence of an incinerator, that was simply speculation on the part of Agent Bradley and there were no objective indications that an incinerator (or any other item) was being used to destroy evidence. With respect to the third factor, we are not convinced Anderson's failure to respond to the knocks or the siren could have led a reasonable officer to conclude destruction of evidence was imminent. We note Anderson was inside a large, two-story, multi-room office building and there was no evidence the agents knew precisely where he was in the building. Under these circumstances, we are not convinced Anderson (whether hearing impaired or not) reasonably could have been expected to hear the knocks or the siren or to respond to them.

As an additional matter, we are concerned with the potential for government manipulation under the facts of this case. The agents testified at the suppression hearing they were concerned Anderson would destroy any evidence stored in the office building if he was alerted to their presence. However, notwithstanding this alleged concern, the agents proceeded to knock on the doors and activate a siren to alert Anderson to their presence. In short, the agents helped create the circumstances they allegedly believed would cause Anderson to attempt to destroy evidence.

For these reasons, we believe the district court correctly concluded "the government presented no evidence that would permit a 'prudent, cautious' officer to assume that destruction of evidence was imminent or

that an emergency was occurring in the building." Appellant's App. at 77. Thus, exigent circumstances did not exist at the time of the warrantless search of the ATD office building.

III.

The government's search of Room 222 was unconstitutional. Accordingly, the items seized during that search and the statements Anderson made at the office building must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The district court's order suppressing evidence seized from the ATD office building and statements made by Anderson while he was being interrogated at his office building is AFFIRMED.

PAUL KELLY, JR., Circuit Judge, dissenting.

The court determines that Mr. Anderson has standing to challenge the search and seizure of evidence from Room 222. I disagree that Mr. Anderson has standing with respect to Room 222 or any corporate common areas. Mere possession of videotapes in an unlocked room that Mr. Anderson neither worked in, nor used regularly, is not sufficient to confer standing. Although the factors the court relies upon are relevant to the inquiry, *see United States v. Cardoza-Hinojosa*, 140 F.3d 610, 615 (5th Cir. 1998), they cannot alone support standing for a workplace search in these circumstances absent a demonstrated "nexus between the area searched and the work space of the defendant," *United States v. Britt*, 508 F.2d 1052, 1056 (5th Cir. 1975), *cert. denied*, 423 U.S. 825, 96 S. Ct. 40, 46 L. Ed. 2d 42 (1975). Such a nexus is nonexistent in this case. It is telling that the court cites no case involving a workplace where standing was found in the absence of such a

nexus.[1] Merely because work-related documents are not involved in this case does not mean that we can overlook the nature of the area searched.

Although "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the facts concerning the relationship between the person and the place searched are important in determining whether the person has met his or her burden of demonstrating a reasonable expectation of privacy, *see Rakas v. Illinois*, 439 U.S. 128, 130-31 n. 1, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). Whether an expectation of privacy is legitimate for Fourth Amendment purposes depends upon "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 183, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). In deciding

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[1] *United States v. Mancini*, 8 F.3d 104 (1st Cir. 1993), is not to the contrary. In that case, the defendant mayor had standing to challenge a search of the town's archive attic, located above the mayor's office, and seizure of his 1987 appointment calendar which contained entries of both a personal and public nature. The attic contained boxes of town records, as well as a box labeled "Mayor's Appointment Books." The court emphasized the physical relationship between the mayor's office and the archive attic, as well as the direction and control that the mayor, who had the position for nineteen years, exercised over access. *Mancini* 8 F.3d at 110. This court is mistaken that "there was no indication the mayor had ever . . . regularly used the attic before the evidence was seized. . . ." Ct. Op. at 1230, n.2. To the contrary, the certificates of occupancy that the mayor allegedly issued in exchange for a $2,000 payment were stored in boxes of building department records located in the attic, *Mancini*, 8 F.3d at 106, and the mayor also stored boxes containing his files and appointment calendars, *id.* at 110. *Mancini* simply is not a case where there is no connection between the employee's work space and the area searched.

this issue, the Court considers location—whether a person or his possessions are in a home, car, curtilage, open field or office. Without question, the warrant clause of the Fourth Amendment applies to searches on commercial premises, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-12, 98 S.Ct. 1816, 56 L. Ed. 2d 305 (1978); *See v. City of Seattle*, 387 U.S. 541, 543, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967), however, commercial premises differ from personal residences in nature and use, and therefore Fourth Amendment protection is more limited. *See Donovan v. Dewey*, 452 U.S. 594, 598-99, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). Where commercial premises are not open to the public, "the reasonable expectation of privacy depends upon the particular nature and circumstances surrounding the place to be searched." *United States v. Bute*, 43 F.3d 531, 536 (10th Cir. 1994); *see See*, 387 U.S. at 545, 87 S. Ct. 1737.

The district court found that Mr. Anderson was present during a holiday and had taken steps to maintain his privacy in Room 222 by closing the door, shutting the blinds and curtains, and by placing a towel over one of the windows. *See* Aplt. App. at 75. This court extends the analysis by focusing on one of the items found in the search of the room, the videotapes in Mr. Anderson's possession, and holds that Mr. Anderson has standing to challenge the search and statements made in connection with it. Under the court's analysis, Mr. Anderson would have standing to challenge a search anywhere in the building provided the item seized was owned and controlled by him, and he had taken steps to maintain privacy. This analysis relies too heavily on Mr. Anderson's possession of the seized videotapes when the primary question must be whether

Mr. Anderson had a legitimate expectation of privacy in the area searched, an objective inquiry. *See United States v. Salvucci*, 448 U.S. 83, 92, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980) ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."); *Rawlings v. Kentucky*, 448 U.S. 98, 104-06, 100 S. Ct. 2556, 65 L.Ed.2d 633 (1980) ("Had petitioner placed his drugs in plain view, he still would have owned them, but he could not claim any legitimate expectation of privacy."); *United States v. Skowronski*, 827 F.2d 1414, 1418 (10th Cir. 1987) ("Whether a person has standing to contest a search on fourth amendment grounds turns on whether the person had a legitimate expectation of privacy in the area searched, not merely in the items seized."). In deciding standing issues, we must consider all of the circumstances, *Rakas*, 439 U.S. at 152, 99 S. Ct. 421 (Powell, J., concurring), including Mr. Anderson's relationship with the area searched.

Numerous circumstances in this case show the complete absence of any nexus between Room 222 and Mr. Anderson's work space, let alone a nexus between Mr. Anderson and the entire building. Room 222 was not Mr. Anderson's office, and no evidence before us suggests that he ever used the room prior to the incident. It was located far from his office, near several common areas (a reception area, restrooms, a conference room and a hallway). The room was vacant, containing no desk, files, or even telephone. It had no particular function, and was accessible by all employees. Mr. Anderson was found, pants undone, in the room, with a blank tape in the VCR. Contrary to the court's assertion, no evidence before us suggests that

Mr. Anderson had the *right* to exclude anyone from the room; one does not gain such right merely by closing the door and covering a window.

The steps that Mr. Anderson took to ensure privacy may be consistent with a subjective expectation of privacy, but that is not enough, no matter how earnestly the steps were taken. In these circumstances, consistent with Mr. Anderson's burden to prove standing, I would hold that he lacked standing and reverse. I therefore respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR-96-129-L

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES S. ANDERSON, DEFENDANT

[Filed: Aug. 5, 1997]

ORDER

On August 6, 1996, a federal grand jury returned a three-count indictment against defendant, James S. Anderson. Count 1 of the indictment alleges that defendant conspired to transmit child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1). Counts 2 and 3 allege that defendant transported child pornography in interstate commerce in violation of 18 U.S.C. § 2252(a)(1). This matter is before the court on defendant's motions to suppress evidence seized from his office and his home and to suppress statements made by him while in custody. The court held an evidentiary hearing on defendant's motions on July 9, 1997. During the hearing, the government presented the testimony of Special Agent Joe Bradley. In addition to the government's evidence, defendant testified at the hearing and presented the testimony of Dr. Martha Jane Little.

Based on the parties' briefs, the applicable case law, and the evidence presented at the hearing, the court finds that defendant's motion to suppress should be granted in part and denied in part.

The evidence establishes that on June 13, 1996, agents of the Federal Bureau of Investigation ("FBI") arrested Paul William Buske in the Western District of Oklahoma. Buske was charged with illegal interstate transmission of child pornography in violation of 18 U.S.C. § 2252. Buske told FBI agents that since August 1995 he had been using his computer to gain access to chat rooms regarding child pornography on the Internet. Buske admitted to trading child pornography with at least 15 other individuals, including an individual with the screen name "AnnBoleyn." On July 2, 1996, Buske engaged in an on-line conversation with AnnBoleyn during which Buske agreed to transmit child erotica to AnnBoleyn on blank video tapes AnnBoleyn had sent to Buske. The FBI arranged for a controlled delivery of blank tapes to AnnBoleyn, whom they had identified as defendant.

On Friday, July 5, 1997, Special Agent Joe Bradley, the agent-in-charge of the investigation at issue here, applied for a warrant to search defendant's house in Duluth, Georgia. The package from Buske was originally scheduled to be delivered to a mail drop location in Norcross, Georgia on Friday, July 5, 1997. The package, however, was not delivered until Saturday, July 6, 1997 and was then retrieved by defendant. FBI agents observed defendant leave a business adjacent to the mail drop carrying the package sent by Buske. Defendant then drove to his place of employment, entering the locked building with a key card.

When agents got to the building, the door was locked because it had automatically locked once defendant entered. Agent Bradley rang the door bell and knocked on the door, but received no answer. One of the officers with Agent Bradley activated the siren on her vehicle in an attempt to get defendant's attention. Again, there was no response from defendant. It was later discovered that defendant normally wears hearing aids, but was not wearing them that day. After having been outside the office building for approximately 10 minutes, Agent Bradley then "retracted the deadbolt" on the front door and entered the building with two other officers.[1] Agent Bradley and the other two officers then conducted an "extensive search of the building,"[2] but did not locate defendant. Agent Bradley then searched the floor again and noticed a light under the door of Room 222. Room 222 was a small interior office with a single door leading to the hallway and two windows. The larger window had blinds and curtains, both of which defendant had closed. The smaller window was covered with curtains over which defendant had placed a towel to block vision into the room. In addition, defendant had closed the door. Agent Bradley opened the door without knocking and discovered defendant with a television and a video cassette recorder ("VCR"). The package from Buske was open and one of the tapes was in the VCR. Agent Bradley identified

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[1] No evidence was presented regarding the exact time the agents entered the building. The court assumes the entry occurred between 10:45 a.m. and 10:50 a.m. because defendant was seen leaving the coffee shop to drive to his office at 10:30 a.m.

[2] Exhibit A to Motion to Suppress Post-Custodia Statements of Defendant at 1.

himself as an FBI agent and notified the two other officers by radio that he had found defendant.

At 11:00 a.m., Agent Bradley began to read defendant his *Miranda* rights using an "Interrogation; Advice of Rights" form. *See* Government's Exhibit 2. Agent Bradley read the first six paragraphs of the form out loud to defendant and asked defendant to follow along with him. He then had defendant read the "Waiver of Rights" paragraph out loud to him. Defendant signed the form at 11:06 a.m. *Id.* Defendant indicated that he understood his rights and agreed to cooperate. Agent Bradley began the interrogation of defendant at approximately 11:10 a.m. Defendant appeared to be articulate and gave appropriate answers to Agent Bradley's questions. During this questioning, defendant detailed his involvement with child pornography on the Internet.

Agent Bradley told defendant that he had a warrant to search his house and asked defendant if he had any child pornography at the office. When defendant admitted that some child pornography was stored in his office, Agent Bradley asked if defendant would have any problem turning it over to the agents. Defendant responded in the negative and accompanied the agents to his office. Once there, defendant directed the officers to where he had hidden the child pornography. The officers made no attempt to perform a general search of defendant's office; rather, they accepted defendant's statements regarding the location of the contraband.

Shortly thereafter, defendant and the officers proceeded to defendant's house to execute the search warrant. While defendant was handcuffed while being transported, the agents removed the handcuffs before going into the house. At the house, defendant told his

wife that FBI agents were there because he had been communicating on the Internet and that the agents would find child pornography. Defendant led the agents to his home office and showed them disks on which child pornography was stored. In addition, defendant unlocked a fire safe, in which the agents found video tapes, women's underwear, and a vibrator. While at defendant's house, approximately four hours after the entry into defendant's office building, defendant executed a written consent to search both his office building and his house.

Defendant argues that the evidence seized from his office is the product of a warrantless entry and search. He contends that the taint of this fourth amendment violation was not vitiated by his later consent to search because that consent was not knowingly and voluntarily given. Defendant claims that the evidence seized from his home must also be suppressed because the search was pursuant to an invalid search warrant. Finally, defendant contends that his statements must be suppressed because he was incapable of knowingly waiving his fifth amendment rights due to his mental condition at the time of his arrest.

The government contends that defendant lacks standing to question the search of his office. The issue of standing is a threshold issue.

> Whether a defendant has standing to challenge a search under the Fourth Amendment is a question of law. . . . "A defendant may not challenge an allegedly unlawful search or seizure unless he demonstrates that his own constitutional rights have been violated." Standing to lodge such a challenge depends upon two factors: (1) whether one demonstrated by his conduct a subjective expecta-

> tion of privacy, and (2) whether society is prepared to recognize that expectation as reasonable.

United States v. Conway, 73 F.3d 975, 979 (10th Cir. 1995) (citations omitted). Defendant contends that he meets both these requirements with respect to the office building, the room in which he was found and his individual office. The evidence establishes that defendant entered the locked office building on a Saturday using a key card and that the door automatically locked again once he entered the building. There is no dispute that the agents broke into the locked office building to search for and to arrest defendant. Once inside the office building, the agents found defendant in a small room where he had taken steps to maintain his privacy; the door, blinds and curtains were closed and defendant had taken added precaution of placing a towel over one of the windows. Defendant thus demonstrated a subjective expectation of privacy in the Room 222. Moreover, the court finds that that expectation was reasonable. Defendant was in a locked office building on a holiday weekend. Society recognizes privacy rights in commercial buildings. As the officer of the company, defendant has the authority to assert a fourth amendment claim to the building.[3]

> There is no doubt that a corporate officer or employee may assert a reasonable or legitimate expectation of privacy in his corporate office. *Cf. Mancusi v. DeForte*, 392 U.S. 364, 88 S. Ct. 2120, 2124, 20 L. Ed. 2d 1154 (1968) ("It has long been

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[3] Defendant was Vice-President of Research and Development for ATD Corporation. As an officer, he had access through use of a master key to all the offices in the corporate building in Norcross, Georgia, except the president's office.

> settled that one has standing to object to a search of his office, as well as of his home."); *United States v. Lefkowitz*, 464 F. Supp. 227, 230 (C.D. Cal. 1979) (corporate officers had sufficient privacy interest in corporate office suite), *aff'd*, 619 F.2d 1313 (9th Cir.), *cert. denied*, 449 U.S. 824, 101 S. Ct. 86, 66 L. Ed. 2d 27 (1980). . . . Similarly, "it seems clear that a corporate defendant has standing with respect to searches of corporate premises . . . ." . . . In addition, except in rare circumstances, a warrant is as necessary to support a search of commercial premises as private premises.

United States v. Leary, 846 F.2d 592, 595-96 (10th Cir. 1988). Thus, the court finds that defendant has standing to challenge the warrantless search of his office.

The next issue for decision is whether the warrantless search was nonetheless reasonable under the fourth amendment. Because the agents conducted the search without a warrant, the government bears the burden of proving that the search was within an exception to the warrant requirement. *See United States v. Scroger*, 98 F.3d 1256, 1259 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1324 (1997). The government argues that exigent circumstances existed that justified the agents' entry into the office building.

> "[T]here is no absolute test for the presence of exigent circumstances because such a determination depends on the unique facts of each controversy." However, in *United States v. Aquino*, 836 F.2d 1268, 1270 (10th Cir. 1988), we articulated four requirements for a permissible warrantless entry when the police fear the imminent destruction of evidence:

> An exception to the warrant requirement that allows police fearing the destruction of evidence to enter the home of [a] suspect should be (1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of evidence is likely, (3) limited in scope to the minimum intrusion necessary, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.
>
> "In assessing whether this burden has been met we evaluate the circumstances as they would have appeared to prudent, cautions and trained officers."

Scroger, 98 F.3d at 1259 (citations omitted). The Tenth Circuit has defined exigent circumstances as arising when

> (1) the law enforcement officers . . . have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search [is not] motivated by an intent to arrest and seize evidence, and (3) there is *some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.*

United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir. 1992) (quoting *United States v. Smith*, 797 F.2d 836, 840 (10th Cir. 1986) (emphasis in *Anderson*).

In seeking to support the exigent circumstances argument, the government presented the testimony of Agent Bradley. Agent Bradley testified that he knew that defendant's corporation worked with heat resistant technology, therefore, he thought that the Norcross office might have an incinerator in which defen-

dant could destroy the blank tapes and any other evidence. Agent Bradley conceded, however, that the reason the agents entered the building was to arrest defendant, which is a prohibited motivation under *Anderson*. The court finds that the government has not met its burden of proving that exigent circumstances existed. The government presented no evidence that would permit a "prudent, cautious" officer to assume that destruction of evidence was imminent or that an emergency was occurring in the building. Agent Bradley's assumption that the building contained an incinerator and that defendant would use the incinerator when confronted with the blank tapes is simply insufficient.

Having found that the entry into the building and the search for defendant constitute a fourth amendment violation, the court must determine whether defendant's statements and the evidence seized from Room 222 and his office must be suppressed as fruits of the poisonous tree.

> "A search preceded by a Fourth Amendment violation remains valid if the consent to search was voluntary in fact under the totality of the circumstances." "The government bears the burden of proving the voluntariness of consent, and that burden is heavier when consent is given after an illegal [detention]." The government must demonstrate that [defendant's] consent to search is "sufficiently an act of free will to purge the primary taint of the illegal [detention]." No single fact is dispositive under the totality of the circumstances test, but the three factors articulated in *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), are especially relevant: "the temporal

> proximity of the illegal detention and the consent, any intervening circumstances, and particularly, the purpose and flagrancy of the officer's unlawful conduct."

United States v. McSwain, 29 F.2d 558, 562 (10th Cir. 1994) (citations and footnote omitted). The *Brown* factors are also used to determine whether defendant's statements were purged of the taint of the fourth amendment violation. *See United States v. Peters*, 10 F.3d 1517, 1523 (10th Cir. 1993). *Brown* contains one additional factor for use when analyzing the admissibility of statements made by a defendant: whether defendant was advised of his Miranda rights prior to making the statements at issue. *Id.*

The court finds that both the items seized in the search of defendant's office and his statements at the office must be suppressed as fruit of the poisonous tree.[4] With respect to defendant's statements, one of the *Brown* factors is clearly met: defendant was advised of his Miranda rights before the agents began interrogating him. That interrogation, however, came directly on the heels of the fourth amendment violation, occuring only minutes after the agents broke into the office building and arrested defendant. There were no intervening circumstances in the short period of time between the break-in and defendant's statements that would vitiate the taint; there was simply no break in the causal connection between the fourth amendment violation and defendant's interrogation. *See United*

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[4] In light of this ruling, the court need not address whether defendant waived his constitutional right to remain silent. This constitutional guarantee may be waived "provided the waiver is made voluntarily, knowingly, and intelligently." *Colorado v. Spring*, 479 U.S. 564, 572 (1987).

States v. Maez, 872 F.2d 1444, 1456 (10th Cir. 1989) (passage of 45 minutes and removal of defendant to interview room not sufficient to remove taint of illegal arrest). Furthermore, while the court does not find that the agents' actions were flagrant,[5] they still constitute a clear violation of defendant's fourth amendment rights. The agents had options available to them other than breaking into the building: they could have waited for defendant to exit the building; they could have sought consent to enter the building from the president of defendant's corporation; or they could have sought a search warrant.[6]

Likewise, the court finds that analysis of the *Brown* factors leads to the conclusion that defendant's consent to search his office was not sufficiently removed from the fourth amendment violation. The government has not demonstrated that defendant's consent to search was "sufficiently an act of free will" because there was no "break in the causal connection between the illegal [break-in] and the consent." *McSwain*, 29 F.3d at 562 n.2. Furthermore, there is no indication that the agents advised defendant of his right to refuse consent, thus calling into question the voluntariness of his consent. *See United States v. Fernandez*, 18 F.3d 874, 882 (10th

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[5] The agents did not simply break into the building unannounced and with guns blazing. They made numerous attempts to gain defendant's attention, all of which failed because defendant was not wearing his hearing aids. Furthermore, it is undisputed that Agent Bradley did not have his gun drawn when he entered Room 222.

[6] Indeed, based on the evidence presented, including that Buske surmised that AnnBoleyn was communicating with him both from his office and his home, the agents may have had sufficient information to ask the magistrate judge to issue a warrant for the office when they requested the warrant for the house.

Cir. 1994) ("Although informing a defendant of his right to refuse consent is not a prerequisite to establishing voluntary consent, we consider it a factor particularly worth noting." (citations and internal quotations omitted)). Based on the totality of the circumstances, the court finds that defendant's consent to search his office was not sufficiently an act of free will to purge the primary taint of the fourth amendment violation.

While defendant challenges the search of his house, he does not allege that that search was tainted by the illegal entry into the office building.[7] Rather, defendant challenges the search of the house on the ground that the search warrant was invalid. Defendant contends that the magistrate judge did not have sufficient probable cause to issue the search warrant because Agent Bradley did not tell the magistrate judge the extent of his experience in child pornography investigations. De-

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[7] Such an argument would be foreclosed by the Supreme Court's decision in *Segura v. United States*, 468 U.S. 796 (1984). In *Segura*, the Court held that where an independent source is present for a search warrant, the legality or illegality of an initial warrantless entry into the premises to be searched has no bearing on the admissibility of the evidence seized pursuant to the search warrant. *Id.* at 816. In the case at bar, the illegal entry was into the office building, not the house for which the agents had a search warrant. Moreover, none of the information or evidence obtained from the office building was used to secure the search warrant. The issuance of the search warrant and the warrantless entry and search in the office building are wholly related. Furthermore, by the time the agents got to the house, nearly four hours had elapsed since the entry into the office building. In addition to the passage of time, defendant was in his own home, without physical restraints. The combination of the passage of time and the change in venue from the office to his home lead the court to conclude that any taint from the unlawful entry into the office building was clearly removed by the time the agents searched the house.

fendant also asserts that Bradley's affidavit does not describe circumstances that would warrant a reasonable person to believe that the articles sought would be located at defendant's home as opposed to another "secure" location.

> In determining whether probable cause supported the issuance of a search warrant, we give "great deference" to the decision of the issuing magistrate or judge. We ask only whether the issuing magistrate or judge had a "substantial basis" for finding probable cause:
>
> > The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all of the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

United States v. Custumano, 83 F.3d 1247, 1250 (10th Cir. 1996). In reviewing the sufficiency of the affidavit, the court should not conduct a *de novo* review. *See United States v. Corral-Corral*, 899 F.2d 927, 931 (10th Cir. 1990).

The court has reviewed Agent Bradley's affidavit in support of the search warrant and finds that it gave the magistrate judge sufficient information to determine that there was "a fair probability" that child pornography would be found at defendant's house. The affidavit states that a confidential informant had been communicating via the Internet with an individual

using the screen name AnnBoleyn and that the informant had traded child pornography with AnnBoleyn. Agent Bradley informed the magistrate judge that he had corroborated the information given to him by the confidential informant. The affidavit details that AnnBoleyn sent blank video tapes to the confidential informant; the informant was then to record child erotics on the tapes and send them back to AnnBoleyn at an address in Norcross, Georgia. On July 2, 1996, AnnBoleyn asked the informant if he had received the blank tapes. The affidavit also indicates that AnnBoleyn used the e-mail address: oaw@pm-atl-port2.randomc.com*missy. Agent Bradley stated that subscriber information obtained by subpoena showed that this e-mail address was listed to defendant at his home address. Further investigation revealed that defendant maintained a private mailbox at the Norcross, Georgia address given to the informant. Agent Bradley reported that "there is reason to believe that ANNBOLEYN will have a computer that is linked to the Internet at his residence because he has communicated with [the informant], via the Internet, primarily at night . . . ." Affiant's Affidavit Under Seal at 12, attached as Exhibit F to Defendant's Motion to Suppress Evidence Seized from Defendant's Place of Employment and Residence. As the agents seized items at plaintiff's house pursuant to a valid search warrant, the court denies defendant's motion to suppress this evidence.

The final issue before the court concerns the statement made by defendant to his wife that he had been communicating on the Internet and the agents would find child pornography at the house. This statement was not made in response to any police questioning, but

rather was spontaneously uttered by defendant in the presence of Agent Bradley. "If a person voluntarily speaks without interrogation by an officer, the Fifth Amendment's protection is not at issue, and the statements are admissible." *United States v. Muniz*, 1 F.3d 1018, 1022 (10th Cir.), *cert. denied*, 114 S. Ct. 575 (1993). Defendant's motion to suppress this statement is therefore denied.

In sum, defendant's Motion to Suppress Evidence Seized from Defendant's Place of Employment and Residence is GRANTED in part and DENIED in part. The evidence seized from defendant's office is suppressed; the evidence from his home pursuant to the validly issued search warrant is not suppressed. Defendant's Motion to Suppress Post-Custodial Statements of Defendant is GRANTED in part and DENIED in part. The statements made to the agents during defendant's interrogation at the office are suppressed as fruit of the poisonous tree. Defendant's spontaneous statement to his wife, which was uttered at the house during execution of the search warrant, is not suppressed.

It is so ordered this 5th day of August, 1997.

/s/ TIM LEONARD
TIM LEONARD
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-6310

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JAMES S. ANDERSON, DEFENDANT-APPELLEE

[Filed: Dec. 1, 1998]

ORDER

Before: SEYMOUR, Chief Judge, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO and MURPHY, Circuit Judges.

The appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. A poll was requested and a majority of the active

judges voted to deny rehearing en banc. Judges Anderson, Tacha, Baldock, Ebel, and Kelly would grant rehearing.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ ARDELL SCHULER
ARDELL SCHULER
Deputy Clerk